

# **The Good, the Bad and the Ugly: Attorney's Fees, Sanctions and Collections**

**The Honorable Patricia Garcia,**

**San Diego Superior Court**

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## **I. Collecting Attorney's Fees**

- A. Screening the Client**
- B. Retainer Fees and Deposits**
- C. Maintaining Efficient Billing Practices**
- D. Maintaining Good Client Relations**

## **II. Applying for Attorney's Fees From the Court**

- A. Family Code §2030 – A Court may order fees which are reasonably necessary to prosecute Family Code proceedings and this order may be augmented at anytime during the proceeding.**
- B. Family Code §2031 – Payment of Retainer/Application for temporary attorney fee orders shall be made by motion or in open court at hearing on merits or default. (including a reasonable retainer to hire an attorney, or costs or both shall be made by motion on notice or by an order to show cause..(b) An order described in subdivision (a) may be made without notice by an oral motion in open court at either of the following times: (1) At the time of the hearing of the cause on the merits.(2) At any time before entry of judgment against a party whose default has been entered pursuant to Section**

**585 or 586 of the Code of Civil Procedure. The court shall rule on any motion made pursuant to this subdivision within 15 days and prior to the entry of any judgment)**

**C. Family Code §2032 - Attorneys Fees Awards During Marital Dissolution -- Factors the court may consider**

- 1. In determining what is just and reasonable under the relative circumstances, the court shall take into consideration**
  - a. The need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Family Code §4320.**
  - b. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested.**
  - c. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.**
  - d. The court may order payment of an award of attorney's fees and costs from any type of property, whether community or**

separate, principal or income.

- e. **Marriage of Mungia (1983) 146 Cal.App.3d 853 (also see IRMO Cueva (1978) 86 Cal.App.3d 290, 296, 300, In re Marriage of Lopez (1974) 38 Cal.App.3d 93, 113 Cal.Rptr. 58, disapproved on other grounds, In re Marriage of Morrison (1978) 20 Cal.3d 437, 453) factors --**

- (1) Nature of the Litigation**
- (2) Difficulty**
- (3) Amount Involved,**
- (4) Skill Required**
- (5) Skill Employed in Handling the Litigation**
- (6) Attention Given, the Success of the Attorney's Efforts**
- (7) Learning,**
- (8) Age**
- (9) Experience in the Particular Type of Work Demanded**
- (10) Intricacies and Importance of the Litigation**
- (11) Labor and Necessity for Skilled Legal Training and Ability in Trying the Cause,**
- (12) Time Consumed.**
- (13) Financial Circumstances of the Paying Spouse May Be Considered.**
- (14) Responsibility Undertaken**

**D. Child and Spousal Support Enforcement --Family Code §3557 – Absent good**

cause to the contrary, the court shall award reasonable attorney's fees to a party who brings an action to enforce a child and/or spousal support order.

**E. Order Modifying, Terminating or Setting Aside Support -- Family Code**

**§3652** Except as against a governmental agency, an order modifying, terminating, or setting aside a support order may include an award of attorney's fees and court costs to the prevailing party.

**F. Contemnor May Be Ordered to Pay Fees -- Code of Civil Procedure**

**§1218(a)** -- [A] person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding

**G. Fees for Minor's Counsel --Family Code §3153 -- If the court appoints**

counsel under this chapter to represent the child, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. [T]his amount shall be paid by the parties in the proportions the court deems just.

**H. No Waiver of Fees for Children Permitted -- Parties may not adversely affect**

rights of children or State by agreeing to limit either child support or attorney fees for issues relating to children. *In re Marriage of Joseph* (1990) 217 Cal.App.3d 1277

**I. Motions for Change of Venue -- CCP 396(b) (b) In its discretion, the court**

may order the payment to the prevailing party of reasonable expenses and

attorney's fees incurred in making or resisting the motion to transfer whether or not that party is otherwise entitled to recover his or her costs of action. In determining whether that order for expenses and fees shall be made, the court shall take into consideration (1) whether an offer to stipulate to change of venue was reasonably made and rejected, and (2) whether the motion or selection of venue was made in good faith given the facts and law the party making the motion or selecting the venue knew or should have known. As between the party and his or her attorney, those expenses and fees shall be the personal liability of the attorney not chargeable to the party. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers, or on the court's own noticed motion, and after opportunity to be heard.(c) The court in a proceeding for dissolution of marriage or legal separation, may, prior to the determination of the motion to transfer, consider and determine motions for allowance of temporary spousal support, support of children, counsel fees and costs, and make all necessary and proper orders in connection therewith.

- J. Inconvenient Forum in UCCJEA case -- Family Code §3427(e) )** If it appears to the court that it is clearly an inappropriate forum, the court may require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in this state, necessary travel and other expenses, including attorney's fees, incurred by the other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.
- K. Unjustifiable Conduct in UCCJEA case -- Family Code §3428(c) --** If a court

dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subdivision (a)[a party seeking to invoke its jurisdiction has engaged in unjustifiable conduct . . .], it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this part.

- L. District Attorney's Fees in Child in Action to Recover Stolen Child -- Family Code §3134 and §3457 --When the district attorney incurs expenses pursuant to this chapter, including expenses incurred in a sister state, [t]he court in which the custody proceeding is pending ... shall, if appropriate, allocate liability for ... reimbursement ... to either or both parties to the proceedings....**
- M. Hague Convention Proceeding Attorneys Fees -- U.S. v. Cummings (9th Cir. 2002) 281 F.3d 1046 and 18 U.S.C. §3663 (Victim and Witness Protection Act of 1982)**
- N. Domestic Violence Proceedings -- Family Code §6344 After notice and a hearing, the court may issue an order for the payment of attorney's fees and costs of the prevailing party.**
- O. Domestic Violence Tort Action -- Code of Civil Procedure §1708.6 -- The**

court, in an action pursuant to this section, may grant to a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees.

**P. Attorneys Fees in Motion for Compensation for Failure to Assume Caretaker Duties or for Thwarting Visitation -- Family Code §3028 -- (a) The court may order financial compensation for periods when a parent fails to assume the caretaker responsibility or when a parent has been thwarted by the other parent when attempting to exercise custody or visitation rights contemplated by a custody or visitation order, including, but not limited to, an order for joint physical custody, or by a written or oral agreement between the parents.**

**(b) The compensation shall be limited to (1) the reasonable expenses incurred for or on behalf of a child, resulting from the other parent's failure to assume caretaker responsibility or (2) the reasonable expenses incurred by a parent for or on behalf of a child, resulting from the other parent's thwarting of the parent's efforts to exercise custody or visitation rights. The expenses may include the value of caretaker services but are not limited to the cost of services provided by a third party during the relevant period.**

**(c) The compensation may be requested by noticed motion or an order to show cause, which shall allege, under penalty of perjury, (1) a minimum of one hundred dollars (\$100) of expenses incurred or (2) at least three occurrences of failure to exercise custody or visitation rights or (3) at least three occurrences of the thwarting of efforts to exercise custody or visitation rights within the six months**

before filing of the motion or order.

(d) Attorney's fees shall be awarded to the prevailing party upon a showing of the nonprevailing party's ability to pay as required by Section 270

**Q. Mandatory Fee Provisions**

**1. Prevailing Party in UCCJEA Actions -- Family Code §3452(a) and §3450(b) --** The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

**2. Remedy for Breach of Fiduciary Duty -- Family Code §1100(e) --** Remedies for breach of the fiduciary duty by one spouse, including those set out in [Family Code §721 and Family Code §1100], shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs.... (See also *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34 for fees under Family Code §1101(h))

**R. Sanctions**

**1. Family Code §271 (a) –** Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of



**attorney's fees and costs pursuant to this section is in the nature of a sanction . . .**

- a. Sanctions may be assessed for bad faith/overly onerous settlement offers. In re Marriage of Abrams (2003) 105 Cal.App.4th 979, 130 Cal.Rptr.2d 16, overruled on other grounds in In re Marriage of LaMusga (2004) 32 Cal.4th 1072,1097**
- b. Amount of sanctions not limited to actual out-of-pocket costs to other side (\$100,000) In re Marriage of Quay (1993) 18 Cal.App.4th 961**
- c. Sanctions were assessable against Wife for her efforts to avoid her share of income tax liability; court's giving her one last chance to avoid them was proper. In re Marriage of Hargrave (Hargrave II) (1995) 36 Cal.App.4th 1313**
- d. \$2,500 in sanctions appropriate in DVPA action, when one party refused to convey real property pursuant to earlier stipulated order. Rayan v. Dykeman (1990) 224 Cal.App.3d 1629**
- e. Wife was awarded \$15,000 based, in part, on Husband's delaying tactics and bad faith. In re Marriage of Bergman (1985) 168 Cal.App.3d 742**
- f. Wife had adequate notice she might be sanctioned under FC §271 and had ability to pay sanctions; whether or not separate**

hearing required, Wife waived issue. In re Marriage of Petropoulos (2001) 91 Cal.App.4th 161

- g. \$3,000 sanctions for bogus spousal abuse charge proper; amount of sanctions need not compensate for all related fees and costs expended. In re Marriage of Battenburg (1994) 28 Cal.App.4th 1338.
- h. Sanctions ordered paid to court for frivolous appeal In re Marriage of Schnabel [Schnabel IV] (1994) 30 Cal.App.4th 747
- i. Amount of sanctions properly measured by reasonable attorney fees incurred in defending against frivolous appeal

In re Marriage of Economou [Economou II] (1990) 223 Cal.App.3d 97

- j. Appellant's conduct in filing brief which constituted "travesty" warranted award of fees to respondent on remand from appeal

In re Marriage of Green (1989) 213 Cal.App.3d 14

- k. Court may award sanctions for reprehensible conduct falling short of bad faith per former Civil Code section 4370.5 In re Marriage of Norton (1988) 206 Cal.App.3d 53,
  - l. Amount of sanctions determined, in part, by offending party's wealth; \$10,000 awarded. In re Marriage of Stich (1985) 169 Cal.App.3d 64, cert. den. 479 U.S. 946.
2. Family Code §3027.1 – Sanctions for false accusations of child abuse - If a court determines, based on the investigation described in [Family Code §3027] or other evidence presented to it, that an accusation of

child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purposes of this section, 'person' includes a witness, a party, or a party's attorney.

(b) On motion by any person requesting sanctions under this section, the court shall issue its order to show cause why the requested sanctions should not be imposed. The order to show cause shall be served on the person against whom the sanctions are sought and a hearing thereon shall be scheduled by the court to be conducted at least 15 days after the order is served.

(c) The remedy provided by this section is in addition to any other remedy provided by law.

**3. Code of Civil Procedure §128.6–**

a. (a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with

**Section 1141.10) of Title 3 of Part 3.**

**b. For purposes of this section:**

**(1)"Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.**

**(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.**

**c. Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.**

**d. In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was**

convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

e. The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

f. This section shall become operative on January 1, 2003, unless a statute that becomes effective on or before this date extends or deletes the repeal date of Section 128.7

4. Code of Civil Procedure §177.5 - A judicial officer shall have the power to impose reasonable money sanctions, not to exceed . . . (\$1,500), . . . payable to the county . . . , for any violation of a lawful court order . . .

a. People v. Tabb (1991) 228 Cal.App.3d 130 – Section properly applied against attorney for being late to scheduled court appearance; miscalendaring not valid excuse; willfulness not required

5. Sanctions for Discovery Abuses -- Code of Civil Procedure §2023 -- Sanctions can be used for the following:

(1) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

(2) Using a discovery method in a manner that does not comply with its specified procedures.

(3) Employing a discovery method in a manner or to an extent that causes

**unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.**

**(4) Failing to respond or submit to an authorized method of discovery.**

**(5) Making, without substantial justification, an unmeritorious objection to discovery.**

**(6) Making an evasive response to discovery.**

**(7) Disobeying a court order to provide discovery.**

**(8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.**

**(9) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made. Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.**

**6. Sanctions on appeal -- Cal. Rules of Court, rule 27 –**

